In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1286

WALTER H. RICHTER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STRATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner challenges the decision below that he was a person required to pay over to the Internal Revenue Service taxes which had been withheld from the wages of employees of certain corporations and that he had willfully failed to pay over the taxes. As a result, he was held personally liable for the unpaid taxes, pursuant to Section 6672 of the Internal Revenue Code of 1954.

The pertinent facts are as follows: During March and April, 1966, petitioner was the majority shareholder, chairman of the board of directors and chief executive officer of Continental-Harrison Company, Inc., and Continental-McClurg Company, Inc. (R. 43).[1] These corporations were indebted to the Central National Bank of Chicago for a substantial loan, and to the Commercial

[1] "R." references are to the record appendix filed in the court of appeals.

Discount Corporation of Chicago for advances secured by inventory and accounts receivable. Both of petitioner's corporations kept their general accounts with the Central National Bank.

Each corporation maintained a payroll account which was funded with checks drawn on the general accounts. Payments to the payroll accounts were made "net", after deduction of the withholding taxes due on the wages paid to the employees. However, although the corporations paid their employees "net" wages after subtraction of withholding taxes, neither corporation separately accounted for or segregated the withheld funds which were required to be paid over to the Internal Revenue Service (R. 43-44).

For some time, both corporations had encountered financial difficulties. While petitioner had been notified by the corporations' accountants that the corporations would have an estimated cash deficit of $854,000 at the end of March, 1966, petitioner arranged for payments to be made to the corporations' creditors during March and April, 1966, while the employment taxes remained unpaid. In late April, 1966, the banks exercised their security rights under their loan agreements with the corporations. The first quarterly employment tax returns for each corporation were not accompanied by remittance of the balances shown to be due, and one corporation's withheld taxes for the first month (April) of the second quarter were also not paid over to the government. The government asserted these tax claims in the ensuing bankruptcies of the corporations but there were insufficient assets available to permit any recovery (R. 44-45).

In Sepember 1969, the Internal Revenue Service assessed the taxes against petitioner, pursuant to Section 6672 of the Code, because petitioner was a person required to collect and pay over withholding taxes and had willfully failed to do so for the employees of the corporations for March and April, 1966 (R. 45). Another officer of the corporations paid part of an identical assessment and then instituted this refund suit. The government then counterclaimed for the balance of the assessment and filed a third-party complaint against petitioner. After a trial, the district court entered judgment against petitioner for the unpaid employment taxes (R. 47-48) and the court of appeals affirmed *per curiam* (Pet. App. 3a-4a).

1. The record supports the finding by both courts below that petitioner was required to pay over the withholding taxes and willfully failed to do so by preferring other creditors of his corporations. There is no basis for review by this Court of this factual question. *Comstock* v. *Group of Investors*, 335 U.S. 211, 214.

Petitoner contends (Pet. 2-6) that he could not be personally liable for the withholding taxes for periods prior to April 30, 1966, because the taxes were not due to be paid until that date, and that the creditors had prevented the payment of the taxes by taking over the corporations' assets prior to April 30, 1966. But the duty of the person responsible for the withholding and payment of employment taxes is a continuing one "which arises when the federal income and social security taxes are withheld from employees' wages and ends when such funds are paid over to the United States." *Newsome* v. *United States*, 431 F.2d 742, 746 (C.A. 5); *United States* v. *Hill*, 368 F.2d 617, 621 (C.A. 5). Thus, petitioner cannot justify his failure to pay the taxes by his belief

that sufficient funds would be available on the due date for payment. It is his act of placing the tax funds at the risk of the business and claims of other creditors which constituted the breach of duty and rendered petitioner personally liable under Section 6672.

2. Petitioner further argues (Pet. 2-6) that the assumption of control over the funds of the corporations by the creditor banks precludes a finding of willfulness. However, prior to April, 1966, neither bank influenced the policies of the corporations or directed the manner or priority of paying the corporations' other creditors (R. 44). It was at this earlier time, before April 30, 1966, when the taxes were due to be paid, that petitioner should have segregated the withheld taxes from the corporations' general funds to insure their ultimate payment.

Finally, petitioner contends (Pet. 3-6) that his inability to challenge the assessment in the Tax Court denied him his right to due process under the Fifth Amendment. There is, however, no constitutional requirement that all federal tax disputes be presented to the Tax Court. That court has no jurisdiction over employment taxes so that the assessment here was challenged in the district court in a refund suit after the payment of one quarter's taxes for one employee. *Steele* v. *United States*, 280 F.2d 89 (C.A. 8). Such a procedure satisfies the constitutional requirement that there be an adequate opportunity for post-assessment judicial review. See *Phillips* v. *Commissioner*, 283 U.S. 589, 595; *Fuentes* v. *Shevin*, 407 U.S. 67, 91-92.

It is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JUNE 1975.